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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

AXIS SURPLUS INSURANCE
COMPANY,

Plaintiff,

ROBERT D. GERINGER; KIRBY D.
COCHRAN; ROBERT CLAWSON;
DOUGLAS W. CHILD; JEFF AUSTIN;
WILLIAM H. DAVIDSON; WILLIAM
K. WARWICK; WILLIAM GRUNDY;
and KEITH GREEN,

Defendants.

Civil Case No. 2:14-cv-00244-DAK

Judge Dale A. Kimball
Magistrate Judge Brooke C. Wells

**ROBERT D. GERINGER'S OPPOSITION TO
PLAINTIFF AXIS' MOTION FOR SUMMARY JUDGMENT**

Robert D. Geringer (“Geringer”), a defendant in the above-captioned action, hereby responds in opposition to *Plaintiff AXIS’ Motion for Summary Judgment* [Dkt. No. 41] (the “Motion”), filed by AXIS Surplus Insurance Company (“AXIS”). This Opposition is based on the *Declaration of Robert D. Geringer in Support of Opposition to Plaintiff AXIS’ Motion for Summary Judgment* (the “Geringer Declaration”), filed concurrently herewith, and the following representations.

I. INTRODUCTION

Summary judgment is appropriate only where the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Eaves v. Fireman’s Fund Ins. Cos.*, 148 Fed. Appx. 696, 699 (10th Cir. 2005); *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, No. 13-3142, 2014 U.S. App. LEXIS 4492, at *5 (10th Cir. Mar. 11, 2014) (reasoning the movant must “demonstrate the absence of a genuine issue of material fact” through the record (quoting Fed. R. Civ. P. 56(c)(1)(A))).

Through the Motion, AXIS restates many of the allegations contained in its complaint—including the allegation that the policy limit under the AXIS Policy is and should be \$1 million. Curiously, however, AXIS filed its Motion without first waiting for all Defendants to answer. Geringer has now answered AXIS’ complaint. As discussed therein, many of AXIS’ allegations are contested. First, it is not at all clear in this case that the AXIS Policy¹ has a policy limit of \$1 million, or whether the remaining balance of the Policy is \$589,661.61. Instead, as discussed below, Geringer now understands that the chapter 11 trustee for the CAREIC bankruptcy estate

¹ Capitalized terms not specifically defined herein have the meaning assigned to them in Geringer’s *Answer to Complaint for Interpleader*, being filed concurrently herewith (the “Answer”).

(the “Trustee”) has begun investigating the events which ostensibly reduced the policy limit from \$5 million to \$1 million (the “Reduction”). The Trustee seeks to determine whether the Reduction was void, avoidable, or involved wrongful conduct by AXIS.² See *Memorandum in Opposition to AXIS’ Motion for Summary Judgment* (the “Trustee Opposition”). The Trustee Opposition asserts the following, among other things:

- When CAREIC filed for bankruptcy relief on October 17, 2011, the AXIS Policy provided a \$5 million limit covering CAREIC, its subsidiaries, and their directors and officers (including Geringer), for claims made during the policy period. Tr. Opp. at *5-6.
- The AXIS Policy was set to expire on December 20, 2012, but included the option to purchase an extension of the time to make claims under the Policy for an additional year, for a payment of 150% of the annual policy premium (the “Tail Coverage”). Tr. Opp. at *12-*13.
- In January 2012, after one-month of policy extensions and following discussions between AXIS and only a subset of the co-defendants (excluding Geringer), AXIS amended the AXIS Policy through Endorsement Number 17 which extended the policy on the following terms: (1) the policy limit was reduced from \$5 million to \$1 million; and (2) AXIS would no longer cover CAREIC as an “Insured” (the “Policy Renewal”). Tr. Opp. at *12-*14.
- Prior to the Policy Renewal, one of Geringer’s co-defendants prepared a notice letter that could be delivered to AXIS to trigger AXIS’ coverage obligation under the \$5 million policy limit (the “Notice”). The Notice was sent to Hub International Midwest Limited (“HUB”), an insurance broker negotiating the renewal terms with AXIS. Tr. Opp. at *13.
- AXIS’ willingness to extend the AXIS Policy was specifically conditioned upon it not formally receiving the Notice, and upon none of the insureds invoking the Tail Coverage. Tr. Opp. at *13.

² Axis is aware of the Trustee’s investigation. Geringer understands that AXIS filed this interpleader action shortly after the Trustee served AXIS with document requests relating to his investigation. Despite its knowledge of that investigation, however, AXIS hurriedly filed its summary judgment motion and continues to maintain that there are no material issues of disputed fact relating to its involvement with the AXIS Policy. On or about July 9, 2014, the Trustee formally informed AXIS of his claims on behalf of the bankruptcy estate. See Tr. Opp. at *14-15.

- The United States Trustee’s Office, the creditors of CAREIC and its affiliates, and the Bankruptcy Court were not informed of the Policy Renewal negotiations or the impact of them on CAREIC’s bankruptcy estate and creditors, nor was Bankruptcy Court approval sought for any renewal of coverage with AXIS, the reduction in coverage from \$5 million to \$1 million and the removal of CAREIC as a named insured. Tr. Opp. at *14; Geringer Decl. ¶ 8.³

As a result of these allegations, there are several genuine issues of material fact that must be litigated before any relief can be granted in this case, including AXIS’ request under 28 U.S.C. § 2361 for a discharge of liability and permanent injunction. *See generally* Geringer Decl. at ¶¶ 8, 10-12 (explaining the need for discovery before summary judgment can be considered); *see also Motion to Defer Consideration to Allow Discovery Under Rule 56(d) of the Federal Rules of Civil Procedure*, filed concurrently herewith by the Trustee (the “Trustee’s 56(d) Motion”). Geringer has a similar need for further discovery on the issues raised in the Trustee’s investigation, and therefore joins in the Trustee’s 56(d) Motion. Specifically, Geringer was not informed of the details of the negotiations or the changes to the Policy before the Policy Renewal. And as a creditor of CAREIC, Geringer did not receive notice of the Policy Renewal or notice that those substantial modifications were approved by the bankruptcy court. *See* Geringer Decl. ¶ 8. Therefore, the parties’ dispute as to the appropriate amount of the policy limit and remaining proceeds precludes any determination on summary judgment that there is a single identifiable fund in controversy, or that the entire amount of the insurance funds have been deposited with the Court. Similarly, the allegations or concerns that AXIS may have committed independent wrongdoing in connection with the reduction of the AXIS Policy, undermines any

³ Geringer, a former President of CAREIC who resigned in 2009, was excluded from the negotiations process with AXIS. He too lacked any notice of the Renewal until after it was effective. Geringer Decl. ¶ 8.

determination at this stage that AXIS is a disinterested stakeholder or that AXIS should be discharged from further liability. Until the Court can determine the proper amount of coverage owed to Geringer and the other co-defendants under the AXIS Policy, and Geringer can determine whether or not AXIS or other parties violated their duties to him as an insured under the AXIS Policy or otherwise harmed his interests, the Motion should be denied.

II. RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIALS FACTS

Geringer does not dispute AXIS' statement of legal elements to establish an insurance company's right to statutory interpleader of remaining policy proceeds. Pursuant to Local Rule 56-1(c), Geringer responds to each of AXIS' stated material facts below. The disputed facts center primarily on whether the Reduction was void, voidable, or otherwise wrongful.

Response to facts discussed under the heading: "Statutory Interpleader Requires a Single Identifiable Fund in Controversy"

1. Disputed. Geringer disputes that the AXIS Policy contains a \$1 million policy limit and that the Reduction from \$5 million was proper, either as to himself or to the CAREIC bankruptcy estate. *See* Tr. Opp. at *26-27; Geringer Decl. ¶ 11.
2. Disputed in part, undisputed in part. Geringer does not dispute that the facts and circumstances of the Trustee's threatened claims are sufficient to constitute a "Claim" under the AXIS Policy as that term is defined, but Geringer disputes that claims have been initiated or "brought" against him.
3. Undisputed, solely for purposes of this Opposition.

4. Undisputed, solely for purposes of this Opposition.
5. Undisputed, solely for purposes of this Opposition.
6. Disputed. Geringer disputes that the remaining portion of the AXIS Policy is \$589,661.61. *See* Tr. Opp. at *26-27; Geringer Decl. ¶ 11.

Response to facts discussed under heading: “Statutory Interpleader Requires the Fund to be Deposited with the Court

7. Disputed. Geringer disputes that the amount deposited with the Court represents the remaining portion of the AXIS Policy. *See* Tr. Opp. at *26-27; Geringer Decl. ¶ 11.

Response to facts discussed under heading: “Statutory Interpleader Requires Competing Claims to a Single Fund Such that The Stakeholder Has A Legitimate Concern of Multiple Liability”

1. Undisputed, solely for purposes of this Opposition.
2. Undisputed, solely for purposes of this Opposition.
3. Undisputed, solely for purposes of this Opposition.
4. Undisputed, solely for purposes of this Opposition.
5. Undisputed, solely for purposes of this Opposition.
6. Undisputed, solely for purposes of this Opposition.
7. Undisputed, solely for purposes of this Opposition.
8. Undisputed, solely for purposes of this Opposition.
9. Undisputed, solely for purposes of this Opposition.

10. Undisputed, solely for purposes of this Opposition.
11. Disputed. Geringer disputes that the undisputed facts in the record of this case satisfy AXIS' burden for interpleader. *See* Geringer Decl. ¶ 11.

Response to facts discussed under heading: "Statutory Interpleader Requires Two Or More Claimants of Diverse Citizenship"

1. Undisputed, solely for purposes of this Opposition.

Response to facts discussed under heading: "A Disinterested Stakeholder Is Entitled To Be Discharged From Liability"

1. Undisputed, solely for purposes of this Opposition.
2. Disputed in part, undisputed in part. Geringer does not dispute that AXIS admits liability with respect to the remaining policy proceeds and is unsure to whom the interpleaded fund should be paid or in what amounts. Geringer disputes that AXIS is a disinterested stakeholder. *See* Geringer Decl. ¶ 11.

III. STATEMENT OF ADDITIONAL ELEMENTS AND UNDISPUTED MATERIAL FACTS

Solely for purposes of this Opposition, Geringer adopts and incorporates herein by reference, the additional statements of undisputed facts set forth in the Trustee Opposition.⁴

IV. LEGAL STANDARD

In determining a summary judgment motion, the Court must "view facts in the light most favorable to the non-moving party" and resolve "all factual disputes and reasonable inferences"

⁴ In the event that the Trustee files or serves a complaint against Geringer, Geringer specifically reserves all of his rights to defend against any and all claims asserted therein, on any and all legal, jurisdictional, factual and equitable grounds.

in favor of the party opposing the motion. *Cillo v. City of Greenwood Village*, 739 F.3d 451, 461 (10th Cir. 2013). The moving party is only entitled to summary judgment when the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Eaves*, 148 Fed. Appx. at 699.

Here, because there are genuine issues of material fact in connection with the amount of coverage owed under the AXIS Policy, the Motion is premature and should be denied or delayed pending discovery. Many questions regarding the Policy Renewal and AXIS’ negotiation of the Policy Renewal remain unanswered and relevant to the relief requested herein. Answering those questions through discovery and, potentially, further litigation, may dictate whether AXIS must deposit almost an additional \$4 million in remaining policy proceeds with the Court before receiving a discharge of future liability.

V. ARGUMENT

A. Summary Judgment is Premature Until Discovery Can be Completed

Geringer recently received over 8300 pages of documentation previously produced to the Trustee, involving the Policy Renewal and the circumstances leading to its negotiation. A preliminary review of that production raises significant questions that undermine the relief requested in this case by AXIS. Geringer is particularly concerned with the apparent decision by CAREIC’s bankruptcy management to forego Tail Coverage—a decision that may have effectively deprived Geringer (as a potential defendant against the Trustee’s threatened claims) of more than \$4 million in protection and value. Through the recent document production, Geringer learned that one of his co-defendants drafted the Notice and sent it to the insurance

broker, but Geringer does not yet know if it was delivered to AXIS or was otherwise disclosed to AXIS so as to trigger the \$5 million coverage. AXIS specifically conditioned any renewal on their *not* receiving formal notices of claims or circumstances which could result in a claim. Although he is an “Individual Insured” as defined by the AXIS Policy, Geringer did not negotiate the Policy Renewal and did not specifically know the AXIS Policy’s limit and terms were being changed until after it occurred. Neither AXIS, HUB, nor the co-defendants involved in the Policy Renewal sought out Geringer’s participation or input prior to its consummation. Geringer’s only involvement was a request for a monetary contribution to pay for the Renewal. *See* Geringer Decl. ¶ 8.

These circumstances must be investigated before AXIS can be afforded a full release of liability and injunction against future claims. Summary judgment is, therefore, inappropriate at this time. Geringer respectfully requests additional time to conduct discovery, pursuant to Federal Rule of Civil Procedure 56(d).

B. The AXIS Policy Renewal Was Improper

Resolving discovery in this matter is particularly important, because it may lead to the conclusion that either the Policy Renewal was void (such that the amount of the remaining policy proceeds is in dispute), or that such renewal resulted in affirmative claims against AXIS that should be asserted and litigated before this case can be resolved.

The AXIS Policy specifically provides that CAREIC alone would represent all insureds to send notices of claims or circumstances, pay any additional premiums to place or renew coverage, and negotiate and accept any endorsement which amends the terms of coverage. *See*

Geringer Decl. ¶ 9 (discussing section VIII.J. of the AXIS Policy). But when CAREIC filed for bankruptcy relief, it and its management forfeited the ability to act outside of the ordinary course of business, without approval from the bankruptcy court. *See* 11 U.S.C. § 363(b) (any use, sale, or lease of property of the estate outside of the ordinary course of business must be approved by the bankruptcy court, following notice to parties in interest and a hearing). Actions which require approval under section 363(b) but are not so authorized are violations of the automatic stay that are considered *void ab initio* and/or unauthorized transfers that are avoidable under section 549 of the Bankruptcy Code.⁵ *See, e.g., Franklin Sav. & Loan Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (“Any action taken in violation of the stay is void and without effect.”); *In re Baker*, 118 B.R. 24 (Bankr. S.D.N.Y. 1990) (lease negotiated post-petition that was not authorized under section 363(b) was void).

CAREIC’s management did not seek approval of the Policy Renewal from the bankruptcy court. Geringer is a creditor of CAREIC with an allowed claim. As a creditor, he did not receive notice of the proposed policy changes, and it does not appear that a hearing was held to consider whether the Renewal was appropriate. As a result, CAREIC, the only party authorized to negotiate the Policy Renewal under the AXIS Policy, was without any authority to do so. The Policy Renewal may, therefore, have been ineffective.⁶ The only way to determine whether these claims are legitimate, however, is to permit further discovery.

⁵ It is conceivable that, based on further discovery, the Trustee may also assert that the Renewal and the commensurate reduction in the policy limit was a fraudulent transfer or was otherwise avoidable under chapter 5 of the Bankruptcy Code.

⁶ Even aside from the clear terms of the AXIS Policy, the Renewal may not have been effective as an improper conversion of property of the estate (*i.e.*, CAREIC’s opportunity under the AXIS Policy to extend the period for lodging claims under the Policy, in exchange for a relatively nominal fee).

VI. CONCLUSION

For the foregoing reasons, Geringer respectfully requests that the Court denies the Motion and AXIS' attempt to discharge itself from any future liability. The Motion is premature and also defeated by the grounds raised by the Trustee Opposition. Additional discovery is needed to determine the facts and circumstances surrounding AXIS' role in the renewal of the AXIS Policy and the amount of coverage owed by AXIS.

Respectfully submitted,
Dated: July 10, 2014

PARSONS KINGHORN HARRIS, P.C.
/s/ George Hofmann
George Hofmann

-and-

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Attorneys for Robert D. Geringer

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

AXIS SURPLUS INSURANCE
COMPANY,

Plaintiff,

vs.

ROBERT D. GERINGER; KIRBY D.
COCHRAN; ROBERT CLAWSON;
DOUGLAS W. CHILD; JEFF AUSTIN;
WILLIAM H. DAVIDSON; WILLIAM
K. WARWICK; WILLIAM GRUNDY;
and KEITH GREEN,

Defendants.

**DECLARATION OF ROBERT D.
GERINGER PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 56(d) AND IN SUPPORT
OF OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Civil Case No. 2:14-cv-00244-DAK

Judge Dale A. Kimball
Magistrate Judge Brooke C. Wells

I, Robert D. Geringer, pursuant to Federal Rule of Civil Procedure 56(d), state as follows:

1. I am the former President and member of the Board of Directors of Castle Arch Real Estate Investment Company, LLC (“CAREIC”) and a defendant in the above-captioned action. In addition, I am a creditor of CAREIC and the holder of an allowed claim in the

CAREIC bankruptcy case in the amount of \$243,146.13. In this capacity, I have personal knowledge of the facts set forth herein and submit this Declaration in support of my Opposition to AXIS Surplus Insurance Company's ("AXIS") Motion for Summary Judgment (the "Motion").

2. On or about July 2, 2014, through my attorneys, I received almost 8300 pages of documentation which I am informed was produced by AXIS and Hub International Limited ("HUB"), an insurance broker, to the bankruptcy trustee for CAREIC's bankruptcy estate (the "Trustee"). The Trustee disclosed the production to my counsel.

3. Based on a preliminary review, the Trustee's documentation appears to include communications between AXIS, HUB and certain of my co-defendants prior to a renewal of coverage with AXIS in January 2012, as well as a draft letter prepared by one of my co-defendants which purports to provide notice of claims and circumstances to AXIS.

4. On or about July 15, 2009, I tendered my resignation to CAREIC and left the company. However, sometime after my departure, I learned that CAREIC purchased the AXIS Policy and that it would cover me for alleged actions I took while employed with CAREIC, pursuant to CAREIC's continuing obligation to indemnify me for actions taken while employed by CAREIC and as a director.

5. I have reviewed AXIS Private Equity and Venture Capital Fund Liability Policy Number EAN756858/01/2010 (the "AXIS Policy") which was attached to AXIS's interpleader complaint as Exhibit 1. Based on my understanding of the policy form, AXIS provided \$5 million of available coverage through December 20, 2012.

6. I also read the Policy to provide the option to renew coverage at \$5 million for the payment of an additional premium for one more year after the expiration of the policy period.

7. I understand that by a series of endorsements to the policy form, the AXIS Policy was extended to January 20, 2012, then renewed for another annual period to January 20, 2013. However, the terms of coverage now appear much different, including the amount of coverage which was reduced from \$5 million to \$1 million by Endorsement 17.

8. Based on some of the documents I reviewed from the Trustee, I understand that AXIS, HUB and some of my co-defendants negotiated the renewal of coverage which took effect on January 20, 2012. To the best of my recollection, I was not involved in any negotiation with AXIS. While I do recall being asked by one of my co-defendants to make a monetary contribution to such a renewal, I do not recall if that was prior to or after the renewal, and I do not believe that my consent to the policy changes was asked for or obtained, having searched my files for any such request or consent and not finding one. Therefore, I believe that neither as an Insured nor as a creditor of CAREIC did I receive notice of the policy changes, or of any request for Bankruptcy Court approval of the policy changes that occurred in connection with the renewal, such as the reduction in policy amount from \$5 million to \$1 million, the elimination of CAREIC as an Insured, and the decision to not formally notify AXIS of pending or possible claims. I have similarly not received notice of any such Bankruptcy Court approval having been obtained.

9. Section VII.J. of the AXIS Policy is titled "Authorization." I understand this provision to authorized CAREIC to send notices, pay premiums, negotiate and accept endorsements, and renew coverage on my behalf.

10. I understand from the Trustee that the AXIS Policy renewal in January 2012, may be voidable or unenforceable and that AXIS could be responsible for \$5 million of remaining policy proceeds, instead of \$1 million, in connection with this interpleader action. I received a copy of the July 9, 2014 demand by the Trustee based on the \$5 million liability limits under the original policy, referenced in the Trustee's opposition to the Motion, as I have read the Trustee's separate opposition to the Motion.

11. I believe that additional discovery will help me and my counsel to understand these contentions and determine whether the relief requested by AXIS is appropriate. Until I can complete that discovery, however, I have reason to dispute and do dispute: (a) that the policy limit for the AXIS Policy is \$1 million; (b) that the remaining portion of the AXIS Policy is \$589,661.61; (c) that the amounts deposited with the Court by AXIS represent the remaining

portion of the AXIS Policy; and (d) that the undisputed record in this case satisfy's AXIS's burden for interpleader.

12. Because new facts and information regarding the AXIS Policy, the correct amount of coverage owed by AXIS to me and my co-defendants, and the process which led to the AXIS Policy's renewal in January 2012 have recently been disclosed to me, I request additional time to conduct discovery as supported further by my Opposition to the Motion.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief.

Dated: July 10, 2014

/s/ Robert D. Geringer
Signed by George B. Hofmann
with permission of Robert D. Geringer